WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 4649

| | |
|---|---|
| IN THE MATTER OF: | Served August 22, 1995 |
| Application of JET TOURS USA, INC., Trading as CITY TOURS, WASHINGTON, D.C., for a Certificate of Authority -- Irregular Route Operations ) | Case No. AP-94-50 |
| Formal Complaint of EASY TRAVEL, INC., Against JET TOURS USA, INC., and CITY TOURS USA, INC. ) | Case No. FC-94-01 |

This matter is before the Commission on the formal complaint of Easy Travel, Inc., Carrier No. 162, against Jet Tours USA, Inc. (Jet), and City Tours USA, Inc. (City), (respondents), and on the application of Jet Tours USA, Inc., trading as City Tours, Washington, D.C. for a certificate of authority.

I. BACKGROUND

The dispute between Easy Travel and respondents first surfaced before the Commission in an informal complaint filed by Easy Travel on July 15, 1994. The informal complaint alleged that City was conducting sightseeing tours and airport transfers in its own vehicles in the Metropolitan District without proper authorization from this Commission. Attached to the complaint were photographs of a van with the name "JET TOURS USA" printed on the side. The Commission forwarded the informal complaint to City by cover letter dated July 15, 1994, and therein advised City of the Compact's requirements. City and Jet responded on July 22 that it was Jet, not City, which had conducted the tours and transfers, that the activities in question had ceased, that the responsible employee had been properly admonished, and that City had made arrangements with a WMATC carrier for future tours and transfers. Easy Travel filed its formal complaint on August 25, 1994. The formal complaint alleges City and/or Jet continued transporting passengers for hire after July 22, 1994.

After receiving the formal complaint and respondents' answers, the Commission's staff scheduled a meeting for October 12, 1994, to explore the possibility of the parties resolving their differences informally. According to staff, a Jet representative stated during the meeting that the Jet employee identified in the July 22 response had been terminated for cause at the end of August. The Jet representative could not rule out the possibility that some violations had occurred on or after July 22. Nevertheless, by the end of the meeting, Easy Travel agreed to a stay of the complaint proceeding on the condition that Jet apply for a certificate of authority and use the services of WMATC carriers while the application was pending. Tour guides were to be hired by the WMATC carriers. Jet filed its

application on October 17, 1994, and the complaint proceeding was stayed.[1]

On November 22, 1994, alleging the October 12 agreement had been breached, Easy Travel filed a motion to lift the stay, a protest to the application, a motion to consolidate the two proceedings and a request for formal hearing. Respondents countered with motions to dismiss the complaint and protest. Respondents' transmittal letter, dated December 2, claimed that any violations which may have occurred after July 22 were without management's knowledge.

Upon finding a breach of the October 12 agreement and reasonable grounds for an investigation, the Commission denied respondents' motions, lifted the stay on the complaint proceeding, consolidated it with the application proceeding and initiated an investigation in which respondents were ordered to produce all records in their possession, custody or control having a reasonable connection with their activities in the Metropolitan District during the period beginning July 22, 1994, and ending on January 5, 1995.[2] A ruling on the request for formal hearing was deferred pending respondents' production of documents, which is now complete.

Easy Travel's counsel withdrew from these proceedings on June 23, 1995. Easy Travel then withdrew its complaint, protest and request for formal hearing by notice filed on August 10, 1995.

## II. THE INVESTIGATION

The investigation focused on three types of conduct: (a) tours and transfers in vans operated by Jet; (b) tours and transfers arranged by respondents and conducted in motor vehicles operated by WMATC carriers; and (c) tours arranged by respondents and conducted in motorcoaches operated by Interstate Commerce Commission (ICC) carriers.

### A. Tours and Transfers in Vans Operated by Jet

Among the documents produced by respondents were respondents' customer billing records and invoices from third-party carriers. Those billing records and carrier invoices establish that respondents arranged numerous tours and transfers in the Metropolitan District during the period under investigation and that the overwhelming majority were conducted in vehicles operated by licensed carriers. Yet, on twenty-eight separate days from July 22, 1994, to August 31, 1994, no licensed carrier was employed. Given Jet's history of violations as admitted in respondents' July 22 response, the timing of the Jet employee's termination, and the equivocation by Jet's representatives at the October 12 meeting and in the December 2 transmittal letter, the documents produced by respondents support a

---

[1] Order No. 4410 (Oct. 20, 1994).

[2] Order No. 4469 (Jan. 5, 1995).

finding that Jet unlawfully transported passengers for hire between points in the Metropolitan District on twenty-eight occasions in 1994.

The Compact, Title II, Article XIII, Section 6(f), provides that a person who knowingly and willfully violates a provision of the Compact shall be subject to a civil forfeiture of not more than $1,000 for the first violation and not more than $5,000 for any subsequent violation and that each day of the violation constitutes a separate violation. "Knowingly" means with perception of the underlying facts, not that such facts establish a violation.[3] "Willfully" does not mean with evil purpose or criminal intent; rather, it describes conduct marked by careless disregard whether or not one has the right so to act.[4] Employee negligence is no defense.[5] After receiving the Commission's July 15 letter, the onus was on Jet to ensure that its operations were lawful.[6] The violations which occurred thereafter are found to be knowing and willful.[7]

The Commission will assess a civil forfeiture against Jet in the amount of $250 per violation, for a total of $7,000, and suspend all but $1,000 in recognition of respondents' complete cooperation with the investigation and the withdrawal of the complaint.

B. Tours and Transfers Arranged by Respondents and Conducted in Motor Vehicles Operated by WMATC Carriers

This part of our investigation was initiated pursuant to the holding in Holiday Tours, Inc. v. WMATC, 352 F.2d 672 (D.C. Cir. 1965) ("Holiday Tours I"). That opinion specifies the factors for determining when a tour operator needs a certificate of authority. We ordered an investigation in this case because the preliminary record established the presence of some of those factors -- City organized the tours, promoted the tours in its name and hired the tour guides who instructed the drivers on which sites to visit -- and because a somewhat similar fact pattern in In re Holiday Tours, Inc., No. 308, Order No. 1560 (May 24, 1976), sustained a finding that the tour operator there had become a carrier. Now that the record is complete, we may proceed to a determination of whether respondents were acting as carriers or merely brokers when they arranged these tours.

---

[3] DD Enters., Inc., t/a Beltway Transp. Serv., v. Reston Limo. Serv., No. FC-93-01, Order No. 4226 (Dec. 20, 1993).

[4] Id.

[5] Id.

[6] Id.

[7] Id.; see also Used Equip. Sales, Inc., v. DOT, 54 F.3d 862 (D.C. Cir. 1995) (once management was aware of violations management was under duty to inquire whether practice was continuing, i.e., management should have regularly queried dispatchers about unauthorized drivers).

Our decision on this issue is guided by the presumption that the entity providing both the vehicle and the driver is the carrier,[8] by our holding in In re Annette H. Milling t/a Milling Tours, No. 322, Order No. 2000 (June 6, 1979), and by the ICC's holding in Tauck Tours, Inc., 49 M.C.C. 491 (Aug. 4, 1949), aff'd, 54 M.C.C. 291 (April 21, 1952).

In Milling, the tour operator sold tickets for sightseeing tours on an individual basis in its own name. Order No. 2000 at 11. The tours were conducted in a bus hired from the Washington Metropolitan Area Transit Authority (WMATA) at an hourly rate and driven by a WMATA driver, who doubled as the tour guide but followed a route dictated by the tour operator. Id. at 9-11. There was no evidence that the tour operator would have been responsible for negligent operation of the bus. Id. at 11. Applying the factors in Holiday Tours I, we held that the tour operator had been operating as a broker or agent, not a carrier. Id. at 9-11.

In Tauck Tours, the tour operator sold tickets for "package" sightseeing tours on an individual basis and conducted the tours in buses chartered from ICC carriers at the carriers' published charter rates. 54 M.C.C. at 292. A tour operator employee would serve as the guide. Id. The tickets did not bear the name of the ICC carrier but contained the following disclaimer: "In accepting this [ticket] it is agreed by the holder that Tauck Tours, Inc. acts only as agents for transportation and hotel services herein concerned and accepts no responsibility for loss, damage, delay, or accident." 49 M.C.C. at 494. Protestants suggested that the tour operator was acting as a carrier and not a broker, but the ICC dismissed that suggestion as "clearly" without merit. 54 M.C.C. at 295. The ICC further noted:

> [I]n order for applicant here to achieve a carrier status in the conduct of its all-expense tours, it would have to appear that applicant took over actual control of, and assumed complete responsibility both to its tour patrons and to the public for, the operation of the busses which it charters. That it does no such thing is apparent from the description of its *modus operandi* contained in the prior reports. Instead, it charters for the use of each tour group certain busses which are operated by drivers who are hired and paid by the equipment owner and who are responsible for the physical operation and maintenance of the equipment throughout the tour. True, applicant controls the tour itinerary and the driver takes instruction from him as to routes to be followed and changes therein, departure hours, and stops, but that is not enough to require, or even support, the conclusion that applicant in fact acquires or assumes actual control over, and responsibility to patrons and the public for, the physical operation of the equipment in which its tours are conducted. Clearly, applicant is not in the

[8] Order No. 4469 at 4 n.10.

described operations operating as a carrier by motor vehicle.

54 M.C.C. at 296.

The record here discloses that City had Jet hire vehicles from WMATC carriers at published rates and that the vehicles were operated by drivers hired by the carriers. The record also discloses that City published a disclaimer as part of its tour brochure. The disclaimer informs potential City patrons that City acts only as an agent for the hotels and carriers whose services are used by City patrons and disavows any responsibility on City's part for deficiencies in the selected services or for any damages, injury or accident. On these facts, we cannot say that respondents assumed control over, and responsibility to patrons and the public for, the operation of the equipment in which its tours were conducted. Accordingly, we find that respondents did not violate the Compact by chartering vehicles from WMATC carriers at lawful WMATC rates for the purpose of providing tours on an individually-priced basis. By extension, we find no violations stemming from transfers arranged by respondents and performed by WMATC carriers at lawful WMATC rates.

C. Tours Arranged by Respondents and Conducted in Motorcoaches Operated by ICC Carriers

The record reveals that on a few occasions respondents combined groups arriving in the Metropolitan District by airplane or train with groups arriving by bus. On those occasions, City chartered a bus from an ICC carrier for a roundtrip excursion beginning and ending in New York, with a sightseeing stopover in DC. Other City patrons who arrived in the Metropolitan District by air or rail and whose DC itinerary coincided with that of the New York bus group were shepherded aboard the bus for a joint tour in the Metropolitan District. At the end of the tour the interim riders disembarked, and the bus departed the Metropolitan District without them. The issue is whether transportation of the interim riders in this fashion by non-WMATC carriers offends the Compact. We hold that it does.

Our analysis begins with the familiar edict that a person may not engage in transportation subject to the Compact unless there is in force a certificate of authority issued by the Commission authorizing the person to engage in that transportation.[9] Exemptions are to be strictly construed.[10] The only statutory exemption that merits discussion is the exemption for transportation under an ICC regular-route certificate where "the majority of passengers transported over the regular route are not transported between points in the Metropolitan District."[11] That exemption does not apply here because

---

[9] Compact, tit. II, art. XI, § 6(a).

[10] D.C. Transit Sys., Inc. v. WMA Transit Co., No. 96, Order No. 521 (Sept. 2, 1965).

[11] Compact, tit. II, art. XI, § 3(e).

all of the passengers on the joint tour were transported between points in the Metropolitan District.[12] The only nonstatutory exemption we need consider is the exemption for roundtrip ICC charters declared in D.C. Transit Sys., Inc. v. Public Serv. Coordinated Trans., FC-17, Order No. 897 (Dec. 18, 1968), aff'd sub nom., D.C. Transit Sys., Inc. v. WMATC, 420 F.2d 226 (D.C. Cir. 1969).

Order No. 897 involved a complaint filed by a WMATC carrier against an ICC carrier. The stipulated facts were as follows:

> Respondent is a common carrier of passengers operating pursuant to authority from the Interstate Commerce Commission. In connection with that authority, it holds special operations authority and incidental charter rights. On October 14, 1966, respondent transported a charter party from Linden, New Jersey to the District of Columbia. The party returned via respondent on October 16, 1966. The party had accommodations at a local motel and during the course of their visit were transported by respondent to and from various points of interest within the Washington Metropolitan District. Only members of the charter party were transported on such tours and all such passengers commenced and ended this trip at Linden.

Order No. 897 at 1-2 (emphasis added). We declined jurisdiction because the bus was chartered "to bring the riders here as a group, to remain together as a group while they visit the sights of the city, and to return to their home city as a group." Id. at 4. The trip was "an integral whole" and could not "be split into its component parts for regulatory purposes." Id. at 4.

On review, the Court of Appeals noted that "[a]ll passengers departed from and returned to the same bus at each stop, and no passengers were either added to or subtracted from the original party during the term of the charter." D.C. Transit Sys., 420 F.2d at 227 (emphasis added). The Court affirmed Order No. 897 because it was consistent with the legislative history of the Compact and avoided the burdens associated with overlapping jurisdiction. Id. at 228-29. A dual regulatory regime would have forced millions of tourists to switch buses, from ICC carriers to local carriers, upon entering the Metropolitan District -- or deluged the Commission with hundreds of applications for operating authority. Id. at 229.

In the instant proceeding, the interim riders were not part of the original charter party. They did not join the tour until it reached the Metropolitan District, and they did not depart with the original group. They were not part of any "integral whole." Their trips had been split into component parts from the very beginning by

---

[12] Because a majority of passengers were transported between points in the Metropolitan District, we need not make a determination as to whether these trips constitute regular-route transportation, although it is most unlikely that any of the carriers in question was operating under such authority.

respondents pursuing their own business interests and for the riders' convenience. Thus, assertion of Commission jurisdiction over interim-rider transportation will not force any passenger transfers or inundate the Commission with applications from ICC carriers. We therefore hold that Order No. 897 should be limited to the facts in that case and not applied to the facts in this case.

Our decision is consistent in this regard with the legislative history of the Compact. When Congress first amended the exemption for ICC regular-route carriers, that provision was "modified to make clear that a carrier engaged in the performance of mass transportation within the Washington area . . . cannot escape the jurisdiction of the Commission by merely extending one of its routes to a point outside the Metropolitan District." Wash. Metro. Transit Compact Amendments, S. Rep. No. 2156, 87th Cong., 2d Sess. 3 (1962). If we did not limit the holding in Order No. 897, carriers could evade our jurisdiction simply by extending a sightseeing route outside the Metropolitan District and taking on token passengers.

Although we find that the Compact was violated on the occasions just described, we do not find that those violations were committed by respondents. Respondents were acting as brokers, not carriers. In the future, however, assuming Jet satisfies the conditions for issuance of a certificate of authority as prescribed below, respondents must refrain from making such arrangements inasmuch as Jet will be obligated to observe and enforce Commission regulations established under the Compact.[13]

## II. THE APPLICATION

Jet seeks a certificate of authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

Notice of the application was served on October 20, 1994, in Order No. 4409, and applicant was directed to publish further notice in a newspaper and file an affidavit of publication. Applicant complied. The application was protested by Easy Travel, but as noted above, the protest has been withdrawn.

### A. SUMMARY OF EVIDENCE

The application includes information regarding, among other things, applicant's corporate status, facilities, proposed tariff, finances, and regulatory compliance record.

Applicant operates under authority from the ICC and the New Jersey Department of Transportation (NJDOT).

---

[13] Compact, tit. II, art. XI, § 5(b).

Applicant proposes commencing operations with a 10-passenger van. Applicant's proposed tariff contains per capita rates for service between hotels, on the one hand, and Washington National Airport and Washington-Dulles International Airport, on the other. Applicant's proposed tariff also contains per capita rates for sightseeing and other tours.

Applicant filed a balance sheet as of April 30, 1994, showing current assets of $9,035; net fixed assets of $127,651; current liabilities of $48,551; long-term liabilities of $102,486; and negative equity of $14,351. Applicant's operating statement for the twelve months ended April 30, 1994, shows operating income of $660,239; operating expenses of $664,091; loss on disposition of assets of $2,427; and a net loss of $6,279. Applicant's projected operating statement for the first twelve months of WMATC operations shows WMATC operating income of $150,000; other operating income of $750,000; operating expenses of $818,000; and net income of $82,000.

Applicant certifies it has access to, is familiar with, and will comply with the Compact, the Commission's rules and regulations, and United States Department of Transportation regulations relating to transportation of passengers for hire. Applicant further certifies that neither applicant nor any person controlling, controlled by, or under common control with applicant has any control relationship with a carrier other than applicant.

B. DISCUSSION AND CONCLUSION

This case is governed by the Compact, Title II, Article XI, Section 7(a), which provides in relevant part that:

> . . . the Commission shall issue a certificate to any qualified applicant . . . if it finds that --
>
> (i) the applicant is fit, willing, and able to perform [the] transportation properly, conform to the provisions of this Act, and conform to the rules, regulations, and requirements of the Commission; and
>
> (ii) that the transportation is consistent with the public interest.

The burden is on applicant to establish its financial fitness, operational fitness, and regulatory compliance fitness.[14] Jet's operational fitness is patent. Jet's financial fitness and compliance fitness are less obvious.

To make out a prima facie case of financial fitness, an applicant must show the present ability to sustain operations during

[14] In re Regency Limo. Serv., Inc., No. AP-94-18, Order No. 4323 (June 21, 1994); In re Reston Limo. & Travel Serv., Inc., t/a Reston Limo., No. AP-93-36, Order No. 4232 (Jan. 11, 1994); In re Mustang Tours, Inc., No. AP-93-30, Order No. 4224 (Dec. 15, 1993).

its first year under WMATC authority.[15] Jet projects net income for its first year of WMATC operations, but Jet's negative equity position detracts from that showing. On the other hand, Jet is an ongoing concern operating under ICC and NJDOT authority. We have found other applicants financially fit under similar circumstances.[16] In addition, Jet's negative equity is attributable to a $45,000 loan from City, which is owned by Jet's shareholders. Jet's shareholders, therefore, are ultimately the principal source of Jet's debt. Consequently, we may base a finding of financial fitness here on our numerous decisions finding highly-leveraged applicants fit where the principal creditors are controlling shareholders.[17]

An evaluation of compliance fitness is prospective in nature.[18] When an applicant has a record of violations, the Commission considers the following factors in assessing the likelihood of future compliance: (1) the nature and extent of the violations, (2) any mitigating circumstances, (3) whether the violations were flagrant and persistent, (4) whether applicant has made sincere efforts to correct its past mistakes, and (5) whether applicant has demonstrated a willingness and ability to comport with the Compact and rules and regulations thereunder in the future.[19]

The nature of the 28 violations was operating without authority. Few violations are more serious. We find no mitigating circumstances. We regard the violations as borderline flagrant, but because there is no evidence of any violations after August 31, 1994, we cannot characterize them as persistent, and we must credit Jet with finally taking appropriate measures, albeit somewhat tardily. Jet's complete cooperation with our investigation and the filing of an application for operating authority demonstrates Jet's willingness to abide by the Compact and regulations thereunder in the future, as Jet has sworn. Upon payment of the assessed forfeiture, Jet's atonement for past transgressions will be complete. The record, therefore, supports a finding of prospective compliance fitness.

One other matter needs to be addressed. Jet proposes to do business under the name City Tours, Washington, D.C. We do not

---

[15] In re A.C. Limo. Serv., Inc., No. AP-95-23, Order No. 4606 (May 31, 1995); In re WDC Sightseeing Tours, Inc., AP-92-33, Order No. 4036 (Jan 12, 1993).

[16] See Order No. 4606 (ongoing concern projecting first-year profit); In re S&W Bus Serv., Inc., No. AP-93-15, Order No. 4103 (May 18, 1993) (same); In re Clyde's Charter Bus Serv., Inc., dba Gunther Charters, No. AP-92-13, Order No. 3979 (July 23, 1992) (same).

[17] See, e.g., Order No. 4606; In re The Airport Shuttle, No. AP-94-22, Order No. 4331 (July 6, 1994); In re M.R. Hopkins Transp. Servs., Inc., t/a M.R. Hopkins Transp., No. AP-94-03, Order No. 4265 (Mar. 28, 1994); Order No. 4103.

[18] Order No. 4323 at 6; Order No. 4224 at 3.

[19] Order No. 4323 at 6; Order No. 4232 at 2; Order No. 4224 at 3.

believe the proposed trade name is consistent with the public interest. The public might confuse Jet with City Tours USA, Inc. Given City's disclaimer in its tour brochure, the public might be misled into thinking they have no recourse against Jet for failure of services or injury, damage or accidents. Under our authority to attach to the issuance of a certificate and to the exercise of the rights granted under it any term, condition, or limitation that is consistent with the public interest, we will prohibit Jet from holding itself out to the public under any name containing the word "City" or the initials "CT", which City Tours uses as its logo.[20]

Based on the evidence in this record, the Commission finds applicant to be fit, willing, and able to perform the proposed transportation properly and to conform with applicable regulatory requirements. The Commission further finds that the proposed transportation is consistent with the public interest.

THEREFORE, IT IS ORDERED:

1. That Jet Tours USA, Inc., is hereby directed to pay to the Commission by money order, certified check, or cashiers check the sum of one thousand dollars ($1,000).

2. That Jet Tours USA, Inc., 26A Oak Street, East Rutherford, NJ 07073, is hereby conditionally granted, contingent upon timely compliance with the requirements of this order, authority to transport passengers, together with baggage in the same vehicles as passengers, in irregular route operations between points in the Metropolitan District, restricted to transportation in vehicles with a manufacturer's designed seating capacity of 15 or fewer persons, including the driver.

3. That Jet Tours USA, Inc., is hereby prohibited from holding itself out to the public under any name containing the word "City" or the letters "CT".

4. That Jet Tours USA, Inc., is hereby directed to file the following documents with the Commission: (a) evidence of insurance pursuant to Commission Regulation No. 58 and Order No. 4203; (b) an original and four copies of a tariff or tariffs in accordance with Commission Regulation No. 55; (c) an equipment list stating the year, make, model, serial number, vehicle number, license plate number (with jurisdiction) and seating capacity of each vehicle to be used in revenue operations; (d) evidence of ownership or a lease as required by Commission Regulation No. 62 for each vehicle to be used in revenue operations; (e) proof of current safety inspection of said vehicle(s) by or on behalf of the United States Department of Transportation, the State of Maryland, the District of Columbia, or the Commonwealth of Virginia; and (f) a notarized affidavit of identification of vehicles pursuant to Commission Regulation No. 61, for which purpose WMATC No. 315 is hereby assigned.

---

[20] See In re Ernest H. Bannister, Sr., No. AP-79-06, Order No. 1996 (May 11, 1979) (sole proprietor ordered to eliminate "Ltd." from trade name).

5. That upon timely compliance with the requirements of this order and acceptance of the documents required by the Commission, Certificate of Authority No. 315 shall be issued to Jet Tours USA, Inc.

6. That Jet Tours USA, Inc., may not transport passengers for hire between points in the Metropolitan District pursuant to this order unless and until a certificate of authority has been issued in accordance with the preceding paragraph.

7. That unless Jet Tours USA, Inc., complies with the requirements of this order within 30 days from the date of its issuance, or such additional time as the Commission may direct or allow, the grant of authority herein shall be void and the application shall stand denied in its entirety effective upon the expiration of said compliance time.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND SHANNON:

William H. McGilvery
Executive Director